AMELIA ANN ALBANO, CITY ATTORNEY
(SBN 103640)
CAROL A. HUMISTON, SR. ASST. CITY ATTORNEY, (SBN 115592)
OFFICE OF CITY ATTORNEY
CITY OF BURBANK
275 East Olive Avenue
P. O. Box 6459
Burbank, CA 91510
Tel: (818) 238-5707 Fax: (818) 238-5724

FILING FEE EXEMPT PURSUANT TO GOVERNMENT CODE § 6103

CITY ATTORNEY
2012 MAY 31 PM 4:27

LINDA MILLER SAVITT, SBN 94164
E-mail: LSavitt@brgslaw.com
BALLARD ROSENBERG GOLPER & SAVITT, LLP
500 North Brand Boulevard, 20th Floor
Glendale, CA 91203
Tel: (818) 508-3700, Fax: (818) 506-4827

RONALD F. FRANK (SBN 109076)
E-mail: rfrank@bwslaw.com
ROBERT J. TYSON (SBN 187311)
E-mail: rtyson@bwslaw.com
BURKE, WILLIAMS & SORENSEN, LLP
444 S. Flower Street, 24th Floor
Los Angeles, CA 90071
Tel: 213-236-0600 Fax: 213-236-2700

Attorneys for Defendant City of Burbank

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

v.

CITY OF BURBANK and DOES 1 through 100, inclusive,

Defendants.

Case No. BC 422252
Assigned to: Hon John L. Segal, Dept. 50

DEFENDANT CITY OF BURBANK'S REPLY TO PLAINTIFF'S OPPOSITION TO ITS MOTION FOR NEW TRIAL OR JNOV; MOTION TO STRIKE OPPOSITION PER RULE OF COURT 3.1113

DATE: June 6, 2012
TIME: 8:30 a.m.
DEPT: 50

Trial Date: March 5, 2012
Action Filed: Sept. 22, 2009

TABLE OF CONTENTS

		Page
I.	THE OPPOSITION VIOLATES RULE OF COURT 3.1113 AND SHOULD BE STRICKEN OR DISREGARDED	1
II.	JURORS 6 AND7 ENGAGED IN MISCONDUCT BY NOT INFORMING THE COURT AND COUNSEL OF THEIR RESPECTIVE PRIOR ARRESTS AND PROSECUTIONS DURING VOIR DIRE, THEREBY PREJUDICING THE CITY	2
III.	CACI 2405 SHOULD HAVE BEEN GIVEN IN A CASE WHERE BOTH SIDES SUBMITTED EVIDENCE BEARING ON WHETHER THE TERMINATION WAS MADE IN GOOD FAITH RELIANCE ON A MISCONDUCT INVESTIGATION, AND WHERE THE DEFENSE TIMELY REQUESTED THE INSTRUCTION	5
IV.	SPECIAL INSTRUCTION NO. 18 WAS IMPROPERLY GIVEN	8
V.	THE ALTERNATIVE JNOV MOTION (OR AT LEAST A NEW TRIAL) SHOULD BE GRANTED AS THERE WAS NO SUBSTANTIAL EVIDENCE OF RETALIATORY ANIMUS	8
VI.	CONCLUSION	10

TABLE OF AUTHORITIES

Page

STATE CASES

Baumgardner v. Yusuf
(2006) 144 Cal.App.4th 1381 5

Beavers v. Allstate Ins. Co.
(1990) 225 Cal.App.3d 310 9

Brown v. Guy
(1956) 144 Cal.App.2d 659, 661 9

Byrne v. City and County of San Francisco
(1980) 113 Cal.App.3d 731 5

Enyart v. City of Los Angeles
(1999) 76 Cal.App.4th 499 ..... 3, 4

Galvez v. Frields
(2001) 88 Cal.App.4th 1410 5

Holocombe v. Burns
(1960) 183 Cal.App.2d 811 9

In re Hamilton
(1999) 20 Cal.4th 273 3

Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.
(1973) 35 Cal.App.3d 948 9

Lunghi v. Clark Equipment Co.
(1984) 153 Cal.App.3d 485 5

Maggini v. West Coast Life Ins. Co.
(1934) 136 Cal.App. 472 9

McGoldrick v. Porter-Cable Tools
(1973) 34 Cal.App.3d 885 5

Nazir v. United Airlines, Inc.
(2009) 178 Cal.App.4th 243 6

Norden v Hartman
(1952) 111 Cal.App.2d 751 9

Ovando v. County of Los Angeles
(2008) 159 Cal.App.4th 42 ..... 2, 3

People v. Valdez
(1986) 177 Cal.App.3d 680 8

People v. Wells
(2012) 204 Cal.App.4th 743 5

Soule v. General Motors Corp.
(1994) 8 Cal.4th 548 5

Teich v. General Mills, Inc.
(1959) 170 Cal.App.2d 791 9

Whitlock v. Foster Wheeler, LLC
(2008) 160 Cal.App.4th 149 3

STATE STATUTES

Code of Civil Procedure § 657(6) 9

Labor Code § 1102.5 ..... 6, 7

RULES

Cal. Rule of Court 3.1113 ..... 1, 2

Cal. Rule of Court 3.1113(d) 1

Cal. Rule of Court 3.1113(e) 1

Cal. Rule of Court 3.1113(f) 1

Cal. Rule of Court 3.1113(g) and 3.1300(d) 2

Defendant City of Burbank ("City") respectfully submits its Reply to the Opposition of Plaintiff William Taylor to the City's Motion for New Trial. City also moves to strike or have the Court disregard the Opposition for exceeding the maximum page limit and for being filed without the required tables of contents and authorities, pursuant to Rule of Court 3.1113.

OPENING SUMMARY OF ARGUMENT

Should the Court consider any of the Opposition on the merits, the Opposition is flawed and attempts to overcome with rhetoric what it lacks in substance. For example, the Opposition argues that jurors failing to disclose their criminal records, despite the City's specific written request for voir dire questioning by the Court that should have induced jurors to reveal the same, was no big deal. It was, and is, a big deal to parties with law enforcement witnesses. The Opposition also attempts to address the errors in law concerning two jury instructions – a defense CACI instruction that was rejected and a Plaintiff special instruction that was given – by bobbing and weaving. The City had the right to the requested jury instruction on the Supreme Court's misconduct investigation-as-good-cause defense to a wrongful termination case, a defense on which both sides had submitted considerable evidence as to which the jury should have received the CACI Committee's legal guidance in evaluating. The denial of that right before the close of evidence likely affected the outcome of the trial, especially given the 9-3 verdict. Moreover, Plaintiff still has provided no law to support its special instruction no. 18 which, as phrased, intimated that a witness violated an order that was never issued. A new trial should be ordered so that these errors can be cured and the verdict's miscarriage of justice remedied.

I. THE OPPOSITION VIOLATES RULE OF COURT 3.1113 AND SHOULD BE STRICKEN OR DISREGARDED.

The City moves to strike Plaintiff's Opposition brief on grounds that it violates Rule 3.1113 of the California Rules of Court. Rule 3.1113 provides that an opposition memorandum must not exceed 15 pages unless, upon application to the Court, the court grants permission to file a longer memorandum. Cal. Rule of Court 3.1113(d), (e). In addition, a memorandum in excess of 10 pages must include a table of contents and table of authorities. Cal. Rule of Court 3.1113(f). Plaintiff's Opposition memorandum is **18 pages** long. The Court did not grant leave

BURKE, WILLIAMS & SORENSEN, LLP
ATTORNEYS AT LAW
LOS ANGELES

to file a longer brief. Further, Plaintiff's Opposition does not include the requisite tables of contents and authorities. Accordingly, Plaintiff's Opposition violates Rule 3.1113 and should be stricken on that basis. Even if the Court denies the City's motion to strike Plaintiff's Opposition brief, the City urges the Court to exercise its discretion to disregard Plaintiff's Opposition as permitted by the interplay between Rules of Court 3.1113(g) and 3.1300(d).

II. JURORS 6 AND7 ENGAGED IN MISCONDUCT BY NOT INFORMING THE COURT AND COUNSEL OF THEIR RESPECTIVE PRIOR ARRESTS AND PROSECUTIONS DURING VOIR DIRE, THEREBY PREJUDICING THE CITY.

The Opposition asserts that the Court's voir dire question to prospective jurors about contact with law enforcement did not embrace the issues of whether a juror had been arrested. Nonsense. Most of the jurors with arrests told the Court about them in response to the "contact" question; the two who did not appear to have hidden that information in order to remain on the panel and vote against the City. That is misconduct no matter how plaintiff attempts to spin it.

"One of the purposes of voir dire is to expose the possible biases of potential jurors, who can be excused for cause if bias is demonstrated or excused through a peremptory challenge if counsel suspects a possibility of bias." *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [emphasis added]. Plaintiff argues that Jurors No. 6 and 7's criminal arrests and prosecutions[1] were not "subjectively positive or negative experiences" with law enforcement and so were not responsive to the questions posed to the jury. When other prospective jurors began volunteering information about their past experience with law enforcement, even some that was

[1] The Opposition seeks to downplay the criminal records with adjectives such as "trivial," "minor" and "insignificant." Juror No. 6 was arrested for carrying a concealed weapon (a dirk or dagger) in a crowd of people and failing to disperse after being ordered to do so. A concealed dagger is not trivial, nor is an arrest. The fact that the weapons charge was dropped in a plea bargain does not make the episode insignificant to the defense in a case where police officers were investigated for uses of weapons on suspects, especially where none of those officers were arrested or prosecuted. Juror No. 7 had much more than a traffic citation; the criminal records show this juror could not legally drive a car, had a drug charge (Count 1 on Case No. 9WA14122), was arrested three different times, failed to appear and had a Bench warrant issued. These are objectively significant, not trivial. At a minimum the defense should have been afforded the opportunity to know about these charges in deciding whether this series of three sets of criminal charges in 2009, 2010, and 2011 rendered Juror No. 7 fit for jury service in 2012 in a case involving law enforcement officers and their integrity. Both of Jurors No. 6 and 7 were arrested by the LAPD, the agency from which discipline decision-maker Scott LaChasse had long been employed. Thus, these are not "minor" or "trivial" issues.

not "strictly negative," or "particularly negative or positive" and the Court and counsel inquired further, that should have been a cue to Jurors No. 6 and 7 that past experience with law enforcement was relevant and should be revealed. But they remained silent. They also failed to respond to Ms. Savitt's catchall question as to whether "there [is] anything that somebody feels they need to share with us that would help us evaluate whether you're … an unbiased and fair juror…" [1 RT, 84:13-18].

"A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." *Ovando*, *supra*, 159 Cal.App.4th at p. 58; see *In re Hamilton* (1999) 20 Cal.4th 273, 294. Jurors No. 6 and 7 chose not to disclose the fact of their respective arrest and conviction records, records which included a 3-time offender for driving with a suspended license plus a drug charge, and the other an arrest and prosecution for carrying a concealed weapon. Objectively, these are material and negative contacts with law enforcement officers that should have been revealed but was not. By withholding information relevant to the existence of possible bias, Jurors No. 6 and 7 committed misconduct.

The misconduct was prejudicial. The declarations of trial counsel established that the City was deprived of its opportunity to expose possible bias and use one or more of its remaining peremptory challenges. In addition, "A showing of misconduct creates a presumption of prejudice." *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 162. While the presumption is rebuttable (*In re Hamilton, supra*, 20 Cal.4th at p. 295), Plaintiff's discussion of prejudice consists of a series of conclusory statements, without analysis or supporting authority. Thus, the Opposition fails to rebut the presumption that the City suffered prejudice by the juror misconduct, and "[g]iven the closeness of the verdict …bias on the part of any one of the majority-voting jurors is necessarily prejudicial." *See Enyart, supra*, 76 Cal.App.4th at p. 511. Had either of Juror No. 6 or No. 7 been excused because of a disclosed bias, or counsel's suspicion of bias, against law enforcement because of their arrests and criminal prosecutions, 2 of the 9 jurors who voted for Plaintiff would not have been present during the deliberations. Rather than speculate as to what replacement jurors would have done had Juror No. 6 or 7 been excused

during voir dire, the Court should simply order a re-trial where the parties can present their witnesses and exhibits (and jury instructions) anew.

Plaintiff's attempt to distinguish the decision in *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499 is immaterial for purposes of this motion. In *Enyart*, certain jurors demonstrated their bias against law enforcement during jury deliberations, which was evidenced by declarations and counter declarations. However, as in this case, the actual misconduct occurred when the jurors concealed their bias during voir dire, which was on the record and under oath. The Court can and should take judicial notice of the criminal records and trial counsel's identification of the pertinent jurors from audio and visual evidence and date of birth data on the criminal complaints as detailed in the moving papers.[2] That the jurors' bias in *Enyart* was evidenced by declarations, and in this case, the misconduct is evidenced by the existence of the jurors' respective criminal records on file with the Los Angeles Superior Court does not change or negate the *Enyart* court's conclusion that "[t]he concealment of bias by a juror during voir dire constitutes serious misconduct warranting a new trial." *Enyart, supra*, at 509. (City is lodging the certified copies of Juror No. 7's criminal complaint files with this reply, as the Airport Courthouse took weeks to process the City's request. See Declaration of Federico Lozada Jr., ¶¶ 2-3.)

Finally, the Opposition urges that the City should have asked follow-up questions of prospective jurors about arrests and convictions. This argument misses the mark. The City's preferred alternative was requesting that the Court, not trial counsel, ask the jurors about either positive or negative contact with law enforcement so that counsel did not have to initiate a discussion with a juror about the often emotionally charged circumstances of an arrest, prosecution, or conviction. The City's tactical decision to refrain from directly asking other jurors (who, like Jurors No. 6 and 7, failed to respond to the Court's voir dire on this issue) was

[2] Opposition footnote 1 states it "does not concede" that Jurors No. 6 and 7 are the persons whose criminal records of which the Court was requested to take judicial notice. But the Opposition does not deny that Jurors No. 6 and 7 are indeed the ones whose records are attached to the moving papers, and submits no evidence even suggesting that they are not. City notes that Juror No. 7's criminal records being lodged with this Reply include a letter from her employer Aramark (Exhibit B-7 to the Declaration of Federico Lozada Jr.), and that in voir dire Juror No. 7 stated Aramark was her employer [1 RT at 20:4-19 attached as Exhibit 2 to the Declaration of Ronald F. Frank in support of the Motion for New Trial].

BURKE, WILLIAMS & SORENSEN, LLP
ATTORNEYS AT LAW
LOS ANGELES

not a reflection of disinterest in or lack of significance of the subject. See Frank Decl. ¶ 4. Further, the Court's insertion of the word "strictly" or "particularly" before "positive or negative" was not at counsel's request, but that added qualifier did not stop other jurors from answering the thrust of the law enforcement contact question. One of those who did answer clearly desired to be excused from jury service and he was; the implication is that Jurors No. 6 and 7 wanted to remain on the panel and concealed their criminal backgrounds in order to exact pay-back against a prosecuting agency, i.e., a police department. They should have revealed their recent criminal histories, at sidebar if they did not want others on the panel to know about those histories, and allow trial counsel the opportunity to develop how significant or material those experiences were in assessing implied or actual bias.

III. CACI 2405 SHOULD HAVE BEEN GIVEN IN A CASE WHERE BOTH SIDES SUBMITTED EVIDENCE BEARING ON WHETHER THE TERMINATION WAS MADE IN GOOD FAITH RELIANCE ON A MISCONDUCT INVESTIGATION, AND WHERE THE DEFENSE TIMELY REQUESTED THE INSTRUCTION.

Section IV of the Opposition at pp. 13-17 addresses the Defense contention that a CACI instruction supported by the facts and allegations of the case should have been given to the jury. The Opposition does not dispute the fact that a party has a right to instructions on the law that are supported by the evidence and the allegations in the case. See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570-572; *People v. Wells* (2012) 204 Cal.App.4th 743, 750 (trial court has duty to give instructions based on a defendant's theory of the case, and to give such instructions sua sponte where there is substantial evidence supporting a defense). "The evidence necessary to justify the giving of an instruction need not be overwhelming. ...the evidence presented may be slight, inconclusive, or even opposed to the preponderance of the evidence." *Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 737.

The failure to give a requested CACI, BAJI, or CALJIC instructions has been grounds for reversal of a host of jury verdicts. E.g., *Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1399 (judgment reversed and remanded due to court's refusal to instruct with BAJI No. 6.06); *Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1424 (court's refusal to give the BAJI instruction was irrefutably prejudicial to Plaintiff's presentation of his case); *Lunghi v. Clark Equipment Co.*

(1984) 153 Cal.App.3d 485, 491-94 (failure to properly instruct the jury on negligence was reversible error); *McGoldrick v. Porter-Cable Tools* (1973) 34 Cal.App.3d 885, 891 (court's refusal to give BAJI instructions was reversible error). Granting motions for new trials prevents the need for appellate courts to reverse jury verdicts for instructional error such as the failure to give a requested pattern instruction.

Plaintiff's attempt to distinguish *Cotran* on the ground that due process rights associated with public employment are different than private contractual employment rights is a non-sequitur. Plaintiff did not claim any violation of those due process rights. Indeed, the *Cotran* case upon which CACI 2405 is predicted was not an "at will" employment case as implied by the Opposition at p. 13. Moreover, the City's research (as well as Plaintiff's, apparently) did not reveal any published decision in a retaliation case, other than *Nazir*, where the *Cotran* good cause defense was addressed by an appellate court. In other words, there is *no* published precedent, or relevant legal principle, which supports Plaintiff's argument that the *Cotran* defense would not apply in the public employment arena. Thus, no appellate court has rejected the use of CACI 2405 in a retaliation case whether under FEHA or *Labor Code* § 1102.5. Moreover, Plaintiff's argument that the *Nazir* case does not support the City's argument ignores the text of the opinion itself and the procedural difference between that case and the present one. *Nazir* was on appeal after an order granting *summary judgment*, so jury instructions and CACI 2405 were not germane.

Contrary to Plaintiff's wishful thinking, the *Nazir* court did not hold that defendant employers could never rely upon their neutral investigation in terminating a plaintiff. Indeed, in the quote Plaintiff presented in his Opposition, the court noted that the appropriateness of the investigation is usually "triable to the jury." *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 278-279. The court spends the next 5 pages explaining why triable issues of material fact existed in that case concerning the adequacy of the investigation. *Id.* at 279-28. The *Nazir* court made clear that it was indeed applying *Cotran* to the FEHA retaliation claim when it led off this analysis by stating: "As will be seen, the investigation here was a far cry, raising a triable issue whether the investigation was, in the language of *Cotran*, 'appropriate.'" *Id.*, at 279. Thus, *Nazir* expressly applied the *Cotran* appropriate investigation analysis to a FEHA retaliation claim.

What the Supreme Court in *Cotran* and the CACI Committee in CACI 2405 both say is that it is the jury's role to decide whether an employer acted in good faith in terminating an employee for dishonesty or other misconduct. Thus, it is for the properly instructed jury to decide whether the employer's stated grounds for the termination were reasonable or in bad faith, whether the investigation was done appropriately or not, and whether the investigation was a sham or a pretext[3] for some other improper motive. Plaintiff here claimed and vigorously argued that the investigation was not done appropriately, that it was a sham, and that the City acted in bad faith rather than for the stated grounds in the *Skelly* notice. The parties presented evidence and argument bearing on each of these elements, but the jury was deprived of the Supreme Court's statement of the law bearing on how to evaluate those elements.

The defense request for CACI 2405 was timely, and more timely than special instruction no. 18 which the Court gave. When the defense requested CACI 2405, on the ninth day of trial, the defense had not yet rested, Ms. Humiston was still on the stand, and Plaintiff had not yet determined whether to offer a rebuttal case. Plaintiff offered 3 new special instructions after the defense requested CACI 2405. The Opposition does not proffer any additional evidence Plaintiff might have offered that he had not already presented on the *Cotran* elements. Accordingly, the requested instruction would not have unfairly prejudiced the Plaintiff, but its refusal did unfairly prejudice the defense by depriving the jury of the law on good cause to discipline an employee based on the employer's reliance on a reasonable misconduct investigation.

The Opposition also argues that the *Cotran* defense should not be permissible in a *Labor Code* § 1102.5 retaliation case, but Plaintiff fails to address the fact that the jury was instructed on the clear and convincing standard for that cause of action (Plaintiff's Special Instruction No. 2). A fully instructed jury could have found by a preponderance that the City reasonably believed – in reliance on the Gardiner investigation -- that Plaintiff had lied and obstructed the Porto's I

[3] The Opposition asserts at p. 15 that the City failed to accurately set forth *Cotran*'s holding in proposed defense CACI 2405. If so, that is an issue for the CACI Committee, whose wording the City quoted verbatim to this Court. Plaintiff did not propose any modification to the language of CACI 2405 to make it more closely mirror what Plaintiff believed to be *Cotran*'s holding. In contrast, the Defense objected to one of Plaintiff's last-minute instructions but did propose some modifications to attempt to make the erroneous instruction more accurate.

investigation, and further found that the City clearly and convincingly negated the claimed retaliatory basis for Plaintiff's *Labor Code* theory. The failure to give CACI 2405 deprived the City of the possibility of that outcome. A new trial should be granted to remedy that error.

IV. SPECIAL INSTRUCTION NO. 18 WAS IMPROPERLY GIVEN

Although the Court requested briefing during the trial on the issue of the witness exclusion order, and although the Motion for New Trial provided citations and authorities demonstrating legal error in giving Special Instruction No. 18, Plaintiff has still failed to cite a single case or statute as authority for his unprecedented instruction. The instruction was not "neutral" as claimed at page 17 of the Opposition. Nor did it apply with equal force to the Plaintiff as the Opposition falsely claimed. The instruction had its intended effect: to impugn Lt. Puglisi, who violated no court order but was essentially sanctioned for having honestly volunteered that he had read plaintiff's trial testimony. Far from conforming his testimony to plaintiff's (the supposed vice addressed by a witness exclusion order (see *People v. Valdez* (1986) 177 Cal.App.3d 680, 687)), Lt. Puglisi testified differently than the Plaintiff just as he had when interviewed years earlier by Mr. Gardiner. The instruction was contrary to law, should not have been given with any reference to the witness exclusion order, and unfairly prejudiced the City by essentially telling the jury that Lt. Puglisi violated that order which he did not.

V. THE ALTERNATIVE JNOV MOTION (OR AT LEAST A NEW TRIAL) SHOULD BE GRANTED AS THERE WAS NO SUBSTANTIAL EVIDENCE OF RETALIATORY ANIMUS

The Opposition at p. 19 recites an argumentative version of the few facts from which Plaintiff argued retaliatory animus in closing. But there was no substantial evidence that the participants in the decision making on Plaintiff's discipline had any such animus. The Plaintiff's attempts to vilify City Manager Flad do not equal any evidence of Flad's participation in the review of Gardiner's investigation. Nor does the fact that Flad himself might have been unhappy with Plaintiff having filed suit equate to any proof that Flad made or even influenced the decision on disciplining Plaintiff. Taylor was not, as the Opposition claims, terminated "shortly after he filed his DFEH and whistleblower claim." The DFEH charge was filed a year before Plaintiff's termination, and his lawsuit was filed 9 months before his termination, but mere days after the

City sought to interview him concerning allegations of official misconduct. The substantial evidence was that Flad was walled off from Chief LaChasse's review of the ten officers whose misconduct Gardiner was investigating. The great weight of the evidence is that Deputy Chief Angel and Chief LaChasse had no personal involvement with or knowledge of Plaintiff, or any of the other officers whom Gardiner found to have committed misconduct. The great weight of the evidence is that LaChasse and Angel used and relied on Gardiner's investigation report of Taylor's misconduct, free of any involvement or input by Flad. In short, there was no causal connection between the purported animus by Flad and the actual process and decisions made by Chief LaChasse.

Where as here there is insufficient evidence to support the verdict in favor of plaintiff, the defendant's motion for JNOV should be granted. *Maggini v. West Coast Life Ins. Co.* (1934) 136 Cal.App. 472; *see Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310; *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.* (1973) 35 Cal.App.3d 948. Further, where a critical element of plaintiff's case is supported only by inferences which are contrary to "clear, positive, uncontradicted [evidence] of such a nature that it cannot rationally be disbelieved," a JNOV should be granted since such inferences do not constitute substantial evidence supporting the verdict. *Teich v. General Mills, Inc.* (1959) 170 Cal.App.2d 791, 799. Here, the missing critical element was any retaliatory animus by Chief LaChasse and Deputy Chief Angel, who were indisputably the decision makers who evaluated the Gardiner report and made the disciplinary adjudication. When a verdict is wholly unsupported by the evidence presented at trial, a court has a duty to grant a motion for JNOV. *Holocombe v. Burns* (1960) 183 Cal.App.2d 811, 815-16.

Alternatively to the JNOV, the Court should grant a new trial based on a dearth of substantial evidence to prove that retaliatory animus was a motivating cause for Plaintiff's termination. With the Court acting "as a thirteenth juror" (*Norden v Hartman* (1952) 111 Cal.App.2d 751, 758), it makes an independent appraisal of the evidence, including all presumptions and inferences to be drawn. *Brown v. Guy* (1956) 144 Cal.App.2d 659, 661. Here, there was no substantial evidence of retaliatory animus for the termination decision and the jury obviously rejected the demotion claim based on its damages award of only Captain salary and

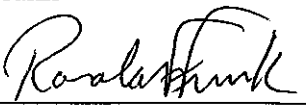
damages, not the Deputy Chief measure of damages. Thus, pursuant to Code of Civil Procedure §657(6), a new trial should be granted based on insufficiency of the evidence.

VI. CONCLUSION

The jury's 9-3 verdict was the product of several errors in the trial process that deprived the City of a fair trial. The voir dire was flawed because 2 of the 9 jurors who voted to award seven figures to Plaintiff harbored biases against police departments, but failed to disclose their criminal records despite being asked about negative experiences with law enforcement. The City asked the Court to raise the issue of negative law enforcement contacts, i.e., prior arrests and prosecutions, and even suggested a private sidebar to encourage forthcoming responses. But Jurors No. 6 and 7 hid their pasts and then exacted revenge by voting against the BPD at the trial. Juror misconduct such as this warrants a new trial.

Further, there were instructional errors both in the Court's refusal of a key instruction based on a controlling Supreme Court precedent and in the Court's giving of a Plaintiff's special instruction with no support in the law. Neither at trial nor in the Opposition did Plaintiff cite any law to support Special Instruction no. 18. Plaintiff claims that CACI 2405 was offered too late during the trial; special instruction no. 18 was offered later but was still given. Further, there was insufficient proof of a key element – retaliatory animus – to justify the verdict. The Court, sitting as the 13th juror, has discretion to order a new trial on the basis of insufficient evidence of retaliatory animus alone. Alternatively, the Court could grant a JNOV based on the total absence of evidence that the disciplinary decisions were motivated by an intent to retaliate against Plaintiff. For any or all the foregoing reasons, the City's motion should be granted and a new trial ordered at the first available date.

BURKE, WILLIAMS & SORENSEN, LLP
Ronald F. Frank

By: 
Ronald F. Frank
Attorneys for Defendant
City of Burbank

PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071-2953. On May 30, 2012, I deposited with Overnite Express, a true and correct copy of the within documents: **DEFENDANT CITY OF BURBANK'S REPLY TO PLAINTIFF'S OPPOSITION TO ITS MOTION FOR NEW TRIAL OR ALTERNATIVE JNOV** in a sealed envelope, addressed as follows:

Gregory W. Smith, Esq.
Law Offices of Gregory W. Smith
9100 Wilshire Blvd., Suite 345E
Beverly Hills, CA 90212

Christopher Brizzolara, Esq.
1528 16th Street
Santa Monica, CA 90404

Linda Miller Savitt, Esq.
Phillip L. Reznik, Esq.
Ballard Rosenberg Golper & Savitt, LLP
500 North Brand Boulevard
20th Floor
Glendale, CA 91203-9946

Amelia Ann Albano, City Attorney
Carol A. Humiston, Sr. Asst. City Attorney
275 East Olive Avenue
Post Office Box 6459
Burbank, CA 91510

Following ordinary business practices, the envelope was sealed and placed for collection by Overnite Express on this date, and would, in the ordinary course of business, be retrieved by Overnite Express for overnight delivery on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 30, 2012, at Los Angeles, California.

Theresa Nevarez